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No. 96-738

In The

Supreme Court of the United States

October Term, 1996

MARIO SALINAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENT BRIGIDO MARMOLEJO, JR. IN SUPPORT OF PETITIONER MARIO SALINAS

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QUESTION PRESENTED

2. The case against Salinas does not meet the prerequisites for a federal prosecution under 18 U.S.C. Section 666 the Federal Bribery Statute because no federal funds were in any manner impinged upon. The case involved bribery from a prisoner in return for contact visits. It has nothing whatsoever to do with the disbursement of or impingement upon federal, or even state or local funds. The question presented here is:

What kind of cases involving state employees are subject to prosecution under the Federal Bribery Statute 18 U.S.C. Section 666? Do such cases include cases where no federal funds are disbursed or impinged?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, Respondent hereby lists the following as parties to the proceedings:

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INTEREST OF RESPONDENT SUPPORTING PETITIONER'S POSITION

Mr. Brigido Marmolejo, Jr. and Petitioner were co-defendants in the courts below. Pursuant to Supreme Court Rule 12.6, Mr. Marmolejo submits this brief on the merits as a Respondent supporting the position of Petitioner. By filing this document Mr. Marmolejo hereby notifies the Court of his interest in the outcome of this case, and qualifies himself for relief from this Court.

SUMMARY OF THE ARGUMENT

In light of legislative history, the rule of lenity, and given the significant incursion by the federal government into the States' primacy over criminal matters and into the affairs of state governance in this case, Marmolejo's and Salinas' convictions must be reversed absent an unambiguous expression of Congressional intent to apply 18 U.S.C. § 666 to the circumstances of this case and a clear threat to a federal interest. Neither exists in this case. Congress expressly limited its jurisdiction under § 666 to situations involving theft, fraud, and bribery involving federal monies.[1] *See* Senate Report No. 225, 98th Cong., 2d Sess. 370 (1984), *reprinted in* 1984 U.S.C.C.A.N.

[1] The jurisdictional restriction is consistent with Spending Clause doctrine regulations of federal expenditures which "might be illegitimate if they are unrelated to the federal interest in particular national projects or programs," or if Congress' desire to regulate is not unambiguously conveyed. *See South Dakota v. Dole*, 488 U.S. 203, 207, 97 L.Ed.2d 171, 178, 107 S.Ct. 2793, 2796 (1987).

3182, 3511 [hereinafter S.Rep. No. 225]. Here, no federal monies were even remotely affected by the bribery conduct.

ARGUMENT

In order to find federal jurisdiction in this case the Fifth Circuit majority opinion grouped a Cooperative Agreement Plan (hereinafter CAP) with Intergovernmental Service Agreement (hereinafter IGA) to form one agreement which it deemed was a "Federal program". *U.S. v. Marmolejo*, 89 F.3d 1185, 1189 n.4 (5th Cir. 1996). It reasoned that this combination constituted a "Federal Program" because the CAP agreement stated that it provided "Federal participation in the funding of local governmental jail construction, renovation or improvement programs". *U.S. v. Marmolejo*, 89 F.3d 1185, 1190-1191 (5th Cir. 1996).[2]

[2] However, Title 18 United States Code § 4002 provides for suitable quarters for the "safekeeping, care and subsistence" of federal prisoners and states no policy objectives. *See also Logue v. U.S.*, 412 U.S. 521, 37 L.Ed.2d 121, 93 S.Ct. 2215 (1973) [County Jail was an independent contractor under 18 U.S.C. § 4002 contract which was governed by Bureau of Prison rules governing, *inter alia*, visitation privileges]. Although, 18 U.S.C. § 666 does not define "federal program", the Senate report accompanying the statute's enactment provides an explicit definition of federal program which excludes payments in exchange for services such as those under the IGA and the CAP.

> "The term 'Federal program' means that there must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives. Thus, not every Federal

More importantly, the majority held that the provision of conjugal visits to inmate Beltran constituted a thing of value which the federal government intended to regulate under § 666 because such visits were of value to Beltran and were a part of Marmolejo's and Salinas' responsibility to control Beltran's visitation under the federal prison housing "program". *U.S. v. Marmolejo*, 89 F.3d 1185, 1192-1193 (5th Cir. 1996). It valued the conjugal visit at the going market rate of $5,000 to meet the jurisdictional requirement that the "transaction" involve "anything of value of $5,000 or more". *U.S. v. Marmolejo*, 89 F.3d 1185, 1192-1193 (5th Cir. 1996).

1. SECTION 666 REQUIRES THE DEFENDANT BE AN AGENT OF AN ORGANIZATION RECEIVING OVER $10,000 IN BENEFITS UNDER A FEDERAL PROGRAM THUS RAISING A QUESTION WHETHER BRIBERY UNDER SECTION 666 MUST AFFECT THE FEDERAL FISC

Section 666(a)(1)(B) applies to an agent of an organization, who " . . . agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of

> contract or disbursement of funds would be covered. For example, if a government agency lawfully purchase more than $10,000 in equipment from a supplier, it is not the intent of this section to make a theft of $5,000 or more from the supplier a Federal crime. It is, however, the intent to reach thefts and bribery in situations of the types involved in the *De Toro, Hinton,* and *Mosley* cases cited herein." S.Rep. No. 225 at 3510.

transactions of such organization, government, or agency involving anything of value of $5,000 or more. . . . " 18 U.S.C. § 666(a)(1)(B). The organization must receive benefits of over $10,000 under a federal program within a year before its agent can be charged with bribery under § 666(a)(1)(B). Subsection (a) requires that the circumstance described in subsection (b) exists.

> "The circumstance referred to in subsection (a) of this section is that the organization . . . receives, in any one year period, benefits in excess of $10,000 under a Federal Program. . . . " 18 U.S.C. § 666(b).

The split among the circuit courts is patent evidence of the ambiguity. *Compare U.S. v. Marmolejo*, 89 F.3d 1185, 1194 (5th Cir. 1996); *with, U.S. v. Foley*, 73 F.3d 484, 490 (2d Cir. 1996). The requirement that the organization receive benefits under a federal program would not need to be in § 666 at all if this statute were *not* meant to protect the integrity of the federal fisc.

"The starting point in interpreting a statute is its language, for 'if the intent of Congress is clear, that is the end of the matter.' " *Good Samaritan Hosp. v. Shalala*, 124 L.Ed.2d 368, 113 S.Ct. 2151, 2157 (1993) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984)); *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L.Ed.2d 290, 109 S.Ct. 1026 (1989); *Howe v. Smith*, 452 U.S. 473, 480, 69 L.Ed.2d 171, 101 S.Ct. 2468 (1980).

Because, the words of § 666(a)(1)(B) can be interpreted to support both the contentions that 1) federal funds must b disbursed or impinged by the bribery; and

2) that federal funds need not be disbursed or impinged by the bribery, it is appropriate to examine the legislative history of § 666.

2. THE LEGISLATIVE HISTORY OF SECTION 666 SHOWS THAT IT WAS INTENDED TO FILL A GAP WHICH CALLED INTO QUESTION THE ABILITY OF THE GOVERNMENT TO PROSECUTE PERSONS FOR BRIBERY WHO WERE NOT FEDERAL OFFICIALS BUT WHO DID ADMINISTER FEDERAL FUNDS

The Senate Report concerning § 666 states that this offense was created to augment the government's ability to "vindicate significant acts of theft, fraud, and *bribery involving Federal monies*. . . . " S.Rep. No. 225 at 3510. And further stated that the purpose of § 666 was "to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud and undue influence by bribery." S.Rep. No. 225 at 3511. Section 666 was intended simply to fill a gap in the existing statutory scheme, which had left in dispute the federal government's authority to prosecute bribery of persons who were not federal officials but who administered federal funds. The Senate Report explained that § 666 was designed to allow such prosecutions by federal authorities, explicitly recognizing that state and local authorities had not brought such prosecutions under their own laws because they perceived the federal government to be "the principal party aggrieved." S.Rep. No.225 at 3510.

Congress recognized that a conflict then existed among, and within, the federal circuits "on the question whether a person employed by a private organization

receiving Federal monies pursuant to a program is a 'public official' for purposes of section 201." S.Rep. No. 225 at 3510-3511 and n.2-3. Congress recognized that resolving this conflict might not be necessary, because the same "issue [was] due to be decided soon by the Supreme Court," which had granted review in *U.S. v. Hinton*, 683 F.2d 195 (7th Cir. 1982), *aff'd sub nom, Dixson v. U.S.*, 465 U.S. 482, 79 L.Ed.2d 458, 104 S.Ct. 1172 (1984). S.Rep. No. 225 at 3510-3511, n.2. It appears that Congress enacted § 666 because it was not clear how the Court would rule in *Hinton* and because any ruling might be limited to "the context of the particular HUD program in that case." S.Rep. No. 225 at 3510-3511, n.2.

Accordingly, far from expressing an intent to intrude broadly into the domain of state and local government, Congress expressed an intent only to prosecute a narrow category of crimes, which state and local officials themselves considered within the domain of the federal government. The crimes of bribery and theft are not federalized simply because the wrongdoing involves an organization which receives money from the federal government. If Congress had intended to criminalize essentially every instance of bribery of a state or local official, whether or not the bribery affected any program involving federal funds, Congress presumably would have mentioned so dramatic an expansion of the law somewhere in its discussion of § 666.

In practice Courts have applied § 666 in this manner. In *U.S. v. Dransfield*, 104 F.3d 350, 1996 WL 537919 (2d Cir. 1996), contracts for noise abatement were awarded to persons under a bid rigging scheme and Federal Aviation Administration funds paid for the contract work through

the New York School Construction Authority. Although the payments could not be identified as the *direct* receipt of *federal funds* the Court found the conduct was covered by § 666 because the *conduct* involved the city contracting with an independent entity to administer federal funds. *U.S. v. Dransfield*, 104 F.3d 350, 1996 WL 537919 (2d Cir. 1996).

Marmolejo and Salinas did not contract with inmate Beltran to administer federal funds. They took private money in exchange for extending superfluous privileges.

In *U.S. v. Foley*, 73 F.3d 484, 490-91 (2d Cir. 1996), the Second Circuit held that the Government is not "required to trace the agent's corrupt expenditures to the federal program funds; but . . . there was no violation [of 666(a)(1)(B)] where the preservation of federal funds was not implicated by the defendant's conduct".

> "Plainly some briberies of state officials may come within the scope of Sec. 666(a)(1)(B), but we infer from the legislative history that that section was not designed for the prosecution of corruption that was not shown in some way to touch upon federal funds." *U.S. v. Foley*, 73 F.3d 484, 494 (2d Cir. 1996).

3. EARLIER LEGISLATION, WHICH PROVIDED THE MODEL FOR § 666, CONFIRMS THAT CONGRESS WAS CONCERNED ONLY WITH BRIBERY INVOLVING FEDERAL FUNDS

The Senate Report on § 666 notes that it was "derived from" S. 1630, a bill introduced in the prior Congress, and, in particular, the comprehensive bribery provision in

section 1751 of that bill. S.Rep. No. 225 at 3510 n.1. The legislative history of section 1751 is therefore instructive as to what Congress did or did not intend to reach in § 666.

The drafters of section 1751 viewed the then existing federal bribery provisions as inadequate because they did not cover all the persons or organizations which should be included or activities which should be illegal. Senate Report No. 97-307, 97th Cong., 1st Sess. 797. Section 1751 therefore included organizations charged by a federal statute with administering federal program monies:

> "an organization charged by a federal statute . . . with administering monies or property derived from a federal program, and the recipient's conduct is related to the administration of such program." Section 1751 (c)(1)(I), S.Rep. No. 97-307, 97th Cong., 1st Sess. 797.

This provision was designed "to protect the integrity of the vast sums of money distributed pursuant to federal programs from undue influence through bribery, by creating federal jurisdiction *when the conduct sought to be affected is related to the administration of the program.*" S.Rep. No. 97-307, 97th Cong., 1st Sess. 803. This Senate Report noted that "unfortunately, although understandably, states and localities are often reluctant to pursue such cases out of a belief that the aggrieved party is primarily the Federal government". S.Rep. No. 97-307, 97th Cong., 1st Sess. 803.

The Senate Report on the bribery provision of § 666 expressly cross-references this discussion of § 1751. In so doing, the Senate Report confirms that in § 666, as in

§ 1751, Congress was concerned with criminalizing bribery of state, local, and private officials where such bribery relates to the administration of "Federal programs". S.Rep. No 225 at 3510 n.1. Congress expressed no interest in prohibiting bribery of such officials in circumstances where the integrity of federal funds is not implicated.

4. THE UNITED STATES' SUGGESTION THAT LEGISLATIVE HISTORY SUPPORTS ITS EXPANSIVE CONSTRUCTION OF § 666 IS MISPLACED

A. CONGRESS' DIRECTIVE THAT "FEDERAL PROGRAM" BE BROADLY CONSTRUED IS IRRELEVANT.

In support of its expansive reading of the bribery provision of § 666, the United States has, in its brief to the Fifth Circuit at page 38, previously invoked the directive in the Senate Report "that the term 'Federal program . . .' be construed broadly." S.Rep. No 225 at 3511. But this definition of "Federal program" does not address whether the act of bribery charged must implicate federal funds. That term addresses which types of federal funding of a state and local or private program may trigger the statute, not whether the statute may be triggered even when no federal funding of any type is affected by the conduct.

In fact, in the same sentence providing for this "broad construction" of "Federal program," Congress confirmed the limited purpose of § 666: "the purpose of this section [is] to protect the integrity of the vast sums of money distributed through federal programs." S.Rep. No. 225 at 3510.

In *U.S. v. Moeller*, 80 F.3d 1053, 1056 (5th Cir. 1996) persons who solicited campaign contributions were rewarded with sham consulting contracts for the Texas Federal Inspection Service. Whether the offense was indeed a federal offense was not raised in *U.S. v. Moeller*, 80 F.3d 1053 (5th Cir. 1996).

B. CONGRESS' CONCERN WITH "COMMINGLING" OF FEDERAL AND NON-FEDERAL FUNDS IS LIKEWISE IRRELEVANT WHERE, AS HERE, THE OFFENSE IS BRIBERY NOT THEFT.

The United States has also relied on the Senate Report's statement that § 666 was designed to reach circumstances in which "the funds are so commingled that the Federal character of the funds cannot be shown." S.Rep. No. 225 at 3510. The Senate Report made this statement with respect to the *theft* provision, 666(a)(1)(a), and not with respect to the bribery provision. The theft provision was expressly designed to fill a separate gap in the law that then existed under 18 U.S.C. § 641. Specifically, Congress intended to criminalize thefts even when "title has passed to the recipient before the property is stolen, or the funds are so commingled that the Federal character of the funds cannot be shown." S.Rep. No. 225 at 3510. Congress specifically designed § 666's theft provision to parallel 18 U.S.C. § 665, which prohibits agents of federal job training programs from stealing "moneys funds, assets, or property which are the subject of a [federal] financial assistance agreement or contract." S.Rep. No 225 at 3510. Congress stated that the theft provision of § 666 was to serve as "statute of general

applicability in this area," S.Rep. No. 225 at 3510, thereby implying that this provision was to apply only where the defendant's actions, like those under § 665, affected the disposition of federal funds. In other words, in the theft provision of § 666 as well as in the bribery provision, Congress was concerned only with reaching misconduct *involving federal funds*.

Consistent with this legislative history, in *U.S. v. Valentine*, 63 F.3d 459, 464 (6th Cir. 1995) the Court, not surprisingly, found that misappropriated funds need not be traced to federal program funds.

The same was found by the Ninth Circuit in *U.S. v. Wincoop*, 11 F.3d 119, 121 (9th Cir. 1993), by the Second Circuit in *U.S. v. Coyne*, 4 F.3d 100 (2d Cir. 1993), and in the Fifth Circuit in *U.S. v. Westmoreland*, 841 F.2d 572, 576-77 (5th Cir.), *cert. denied*, 488 U.S. 820, 109 S.Ct. 62, 102 L.Ed.2d 39 (1988) [in this context "it is clear that Congress has cast a broad net to encompass local officials who may administer federal funds, regardless of whether they actually do"].

5. FURTHER, THE AMBIGUITY REGARDING WHETHER BRIBERY UNDER § 666 MUST IMPINGE ON FEDERAL FUNDS MUST BE RESOLVED IN FAVOR OF LENITY

The rule of lenity dictates that Marmolejo's and Salinas' convictions be set aside. If there are any doubts in interpreting an ambiguous statute, they are resolved in the defendants' favor. *U.S. v. Enmons*, 410 U.S. 396, 411, 35 L.Ed.2d 379, 93 S.Ct. 1007 (1973). "This being a criminal statute, it must be strictly construed, and any ambiguity

must be resolved in favor of lenity." *U.S. v. Enmons*, 410 U.S. 396, 411, 35 L.Ed.2d 379, 93 S.Ct. 1007 (1973). In light of the rule of lenity, and given the significant incursion by the federal government into the states' primacy over criminal matters and into affairs of state governance in this case, Marmolejo's and Salinas' convictions must be reversed absent an unambiguous expression of Congressional intent to apply § 666 to the circumstances of this case and a clear threat to a federal interest.

6. AMERICAN FEDERALISM PRECLUDES APPLICATION OF A FEDERAL STATUTE TO AN AREA HISTORICALLY COVERED BY THE POLICE POWERS OF THE STATES ABSENT CONGRESS' CLEAR STATEMENT TO THE CONTRARY

Thus, it cannot be presumed that Congress intended in § 666 to vastly expand federal criminal jurisdiction to reach virtually all bribery involving state and local officials without any mention in its text, statutory findings, or legislative history. Instead, under *U.S. v. Bass*, 404 U.S. 336 (1971), and its progeny, before courts may construe a federal criminal statute to so fundamentally alter the relationship between federal and state governments, Congress must have clearly stated its intent to do so. Congress has made no such statement here. The Government's reading of § 666 is all the more implausible given the history of federal bribery legislation, which traditionally has applied only to areas of direct federal interest. *See generally Dixson v. U.S.*, 465 U.S. 482, 491-92 (1984). *See also* Section 2 *supra*. If Congress had intended to criminalize essentially every instance of bribery of a state or local official, whether or not the bribery affected

any program involving federal funds, Congress presumably would have mentioned so dramatic an expansion of the law somewhere in its discussion of § 666.

The integrity of the funds expended under the IGA and CAP were not affected in any way by the scheme to pay private funds in exchange for conjugal visits. The payment of $840,000 received by Hidalgo County per year for housing federal prisoners at cost was not diverted or expended in an improper manner because of the exchange of private money by Beltran for superfluous visitation privileges. The conjugal visits were not provided for in the IGA, CAP or 18 U.S.C. § 4001 *et seq.*

The authority for the USMS, a branch of the Department of Justice, to enter into the CAP and IGA is found in 18 U.S.C. §§ 4001-009 & 4041-042. In particular, § 4002 provides:

> "For the purposes of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Attorney General may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons." 18 U.S.C. § 4002.[3]

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[3] Section 4002 further provides that the rates to be paid for the care and custody of federal prisoners depends on the character of the quarters, sanitary conditions and quality of subsistence. Section 4006 states that "[t]he Attorney General shall allow and pay only the reasonable and actual cost of the subsistence of prisoners. . . . " With respect to construction, § 4003 authorizes the Attorney General to select sites for

No significant acts of theft, fraud or bribery involving Federal monies occurred. Beltran was provided the same "safekeeping, care and subsistence" which other federal inmates received under the housing agreements at no extra cost to him or expense to the federal government. Beltran made separate arrangements for the superfluous privilege of receiving conjugal visits in a manner which did not affect the federal fisc.

The Fifth Circuit majority would extend federal jurisdiction beyond matters involving or affecting the integrity of the federal fisc to include anything a private person might assign a value of $5,000 or more. Under the Fifth Circuit's analysis, as long as Marmolejo and Salinas were seeing to the needs of federal inmates, in exchange for $5,000 or more, anything they might provide, including "intangibles", would bring their conduct within 18 U.S.C. § 666. Such "intangibles" could conceivably

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building prisons when space is not available, and § 4009 authorizes appropriations "for the purpose of leasing or acquiring a site, preparation of plans and erections of necessary buildings under § 4003."

It is clear from the history of §§ 4001 *et seq.* that Congress was simply trying to find a way to provide adequate federal prison space for housing federal prisoners. Prior to 1895 there were no federal prisons and all federal prisoners were confined to state prisons. *See* Ira P. Robbins, *The Prisoners' Mail Box and the Evolution of Federal Inmate Rights*, 144 F.R.D. 127, 132-35. The statute further authorized the Attorney General to appropriate money for the "leasing or acquiring of a site, preparation of plans, and erection of necessary buildings." May 14, 1930, c. 274, at § 5, 46 Stat. 326.

With minor revisions, the pertinent portions of that act are now codified at 18 U.S.C. §§ 4001 *et seq.*

include cell assignment, top versus bottom bunk sleeping arrangements, extra recreation time, permission to smoke cigarettes, or an extra visit from family members arriving at the jail during non-visitation hours.[4] Neither the text nor the legislative history of § 666 provides any indication, much less the *clear* indication required by *U.S. v. Bass*, 404 U.S. 336, 349, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971) and its progeny, that Congress intended to criminalize nearly every act of bribery of state and local government that involves at least $5,000.

Public officials who receive payments above their salaries in exchange for such privileges may be charged under Texas Penal Code § 36.01 with bribery. This is also true in other states. *See, e.g.*, AL ST § 13A-10-60 *et seq.*; AK ST § 11.56.100 *et seq.*; AR ST § 21-8-607; CT ST T.53A, Ch. 952, Pt. XI, Refs & Anos.; MN St § 609.42; NY CIV SERV § 107; WV ST § 61-5-7. "Federalism serves to assign political responsibility," and to hold government accountable to the people. *See U.S. v. Lopez*, 115 S.Ct.1624, 1638, 131 L.Ed.2d 626 (1995) [Kennedy, J., concurring]. Because this is so, the concept of American federalism requires Marmolejo's and Salinas' convictions be set aside.

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[4] "[T]he legislative history of Sec. 666 indicates that the value of a thing for purposes of Sec. 666 (a)(1)(B) is not to be assessed by reference to any and every perspective or measure of value, no matter how subjective or arbitrary. Instead, the assessment of the things of value must be connected, even if only indirectly, to the integrity of federal program funds." *U.S. v. Foley*, 73 F.3d 484, 490 (2d Cir. 1996).

Congress will not be seen as having made "conduct readily denounced as criminal by the states" a federal offense unless it "clearly" states this purpose. *U.S. v. Bass*, 404 U.S. 336, 349, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971). *See Gregory v. Ashcroft*, 501 U.S. 452, 461, 115 L.Ed.2d 410, 111 S.Ct. 2395 (1991) ["this plain statement rule is nothing more than an acknowledgment that the states retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere"].

This Court has long required that Congress speak with particular clarity if it intends to criminalize the sort of conduct that historically has been prosecuted by the states. *See U.S. v. Bass*, 404 U.S. 336, 349, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971); *Williams v. U.S.*, 458 U.S. 279, 287, 290, 73 L.Ed.2d 767, 102 S.Ct. 3088 (1982); *U.S. v. Enmons*, 410 U.S. 396, 411-12, 35 L.Ed.2d 379, 93 S.Ct. 1007 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L.Ed. 1447, 67 S.Ct. 1146, 1152 (1947). Congress did not do so in § 666 despite the fact that "[m]ost if not all States criminally prosecute bribery and acceptance of bribes." *Dixson v. U.S.*, 465 U.S. 482, 512 n.*, 79 L.Ed.2d 458, 104 S.Ct. 1172 (1984) [O'Connor, J., dissenting].

Congress expressly limited federal jurisdiction under § 666 to criminalize the bribery of, and solicitation of bribery by, state and local officials in connection with their administration of federal funds. But Congress nowhere indicated any intent to reach virtually all bribery involving state and local officials, even where, as here, the bribery has no connection to any federally funded program. Accordingly, if Congress intends that

the federal criminal statutes reach all such bribery, however attenuated the connection to any federal funds, Congress should be directed to "speak more clearly than it has." *McNally v. U.S.*, 483 U.S. 350, 360, 97 L.Ed.2d 292, 107 S.Ct. 2875 (1987).

Just as overreaching by the federal government can obscure political accountability, *see U.S. v. Lopez*, 115 S.Ct.1624, 1638, 131 L.Ed.2d 626 (1995) [Kennedy, J., concurring], overreaching into areas particularly amenable to the state political process can usurp the electorate's role as the primary watchdog over its elected officials and their actions. *See generally U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 131 L.Ed.2d 881, 115 S.Ct. 1842, 1863-64 (1995) [discussing electorate's important role in governing under our republican government]. Because policing the ethical behavior of state and local public officials is uniquely amenable to the state electoral process, absent a clear threat to a significant federal interest, federal law should not be read to sanction Congressional oversight of state government. *See Dixson v. U.S.*, 465 U.S. 482, 509-11, 79 L.Ed.2d 458, 104 S.Ct. 1172 (1984) [O'Connor, J., dissenting] (recognizing that application of bribery statute to state or local government raises significant problems of autonomy and federalism).

7. CONJUGAL VISITS DO NOT CONSTITUTE "ANYTHING OF VALUE" OF $5,000 OR MORE

Moreover, the conjugal visits provided to Homero Beltran in exchange for $5,000 and $6,000 cash payments must constitute a thing valued at $5,000 or more in connection with the Hidalgo County Jail's business which

the federal government has an interest in policing. The cash for contact and conjugal visits transactions do not present a clear threat to a federal interest, but instead present a wrong historically within the police powers of the state.

Recently, in *McNally v. U.S.*, 483 U.S. 350, 360 (1987), the Court rejected the government's claim that the mail fraud statute, 18 U.S.C. § 1341, criminalized schemes that deprived the citizenry of their right to "honest government services." Before § 1341 would be read to intrude so dramatically on traditional state criminal jurisdiction, said the Court, Congress would have to "speak more clearly." *McNally v. U.S.*, 483 U.S. 350, 360 (1987). In particular, application of § 1341 to otherwise lawful conduct of state and local government officials would "take a much clearer indication" of congressional intent. *McNally v. U.S.*, 483 U.S. 350, 360 (1987).

A. Even if the contractual arrangement between the USMS and Hidalgo County constitutes a Federal program for jurisdictional purposes, the statute is still inapplicable because the corrupt acts in this case did not affect any federal interest that § 666 is intended to protect. Thus, pursuant to the plain language and legislative history of the statute, as well as the principles of federalism and rule of lenity discussed above, Marmolejo's and Salinas' convictions must be reversed.

The clear congressional objective in enacting § 666 was to safeguard the integrity of federal funds, rather than ensuring the integrity and honesty of public servants generally. The text of the statute targets only those organizations which administer federal funds disbursed

pursuant to a federal program. Moreover, § 666(a) requires the theft or embezzlement of at least $5,000 worth of property from the organization receiving federal funds, or, with respect to bribery, the wrongdoer must act with the intent to influence or be influenced "in connection with any business, transaction, or series of transactions of such organization . . . involving anything of value of $5,000 or more." 18 U.S.C. § 666(a). Thus, according to its language, § 666 is clearly aimed at vindicating acts which adversely affect financial resources.

A congressional intent to protect funds in which the government retains an interest also finds support in § 666's legislative history. With respect to bribery in particular, Congress enacted § 666 to alleviate the difficulties in prosecuting bribery under 18 U.S.C. § 201. Section 201's primary objective, clearly supported by its text and legislative history, is to promote and maintain high ethical standards of behavior of persons holding positions of public trust. *See* S.Rep. No. 2213, 87th Cong., 2d Sess. 1962, *reprinted in* 1962 U.S.C.C.A.N. 3852, 3853-56 [hereinafter S.Rep. No. 2213]; *U.S. v. Dixson*, 465 U.S. 482, 491-96 (1984). The language of § 201 does not even remotely require a threat to federal funds as a prerequisite to prosecution; instead, Congress enacted § 201 to ensure the honest services of people performing a broad spectrum of official duties. Section 201's applicability hinges upon whether the corrupt activity involves a "public official or person who has been selected to be a public official."[5] *See* 18 U.S.C. § 201(b)&(c). Although

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[5] "The term 'any person acting for or on behalf of the United States' was coined in the recodifications of the 1870's,

"public official" is defined broadly, and includes anyone "acting for or on behalf of the United States, or any department, agency or branch of Government thereof," *see* 18 U.S.C. § 201(a), courts have had difficulty demarcating the limits of the government's interest in ensuring the honesty of people potentially connected to the federal government. In particular, at the time of § 666's enactment, courts were divided on whether a person employed by a private organization receiving Federal monies was a public official for purposes of § 201. *See* S.Rep. No. 225 at 3510-11.

Section 666 alleviates this problem by protecting the integrity of federal funds directly, rather than protecting the integrity of the persons charged with administering them. Unlike § 201, which focuses on whether a sufficient nexus exists between the person administering the federal funds and the federal government, § 666's text and legislative history focus on whether a sufficient nexus exists between the corrupt acts and the federal government's interest in protecting the objects of those acts, namely, federal funds disbursed to achieve public policy goals. Although federal funds arguably do not have to be directly implicated by the corrupt transaction, the general dishonesty of the wrongdoers, completely unrelated to a threat to federal funds, clearly is not enough under § 666.

Rev. Stat. §§ 5451, 5501, and replaced the phrase 'person holding any place of [public] trust or profit, or discharging any official function under, or in connection with [the Government],' which appeared in previous statutes." *U.S. v. Dixson*, 465 U.S. 482, 493 n.11 (1984).

B. Marmolejo and Salinas were charged with accepting "anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transaction of [Hidalgo County Jail] involving anything of value of $5,000 or more." 18 U.S.C. § 666(a)(1)(B). Specifically, Marmolejo and Salinas allegedly received money in excess of $5,000 in exchange for arranging conjugal visits for a federal prisoner. Their alleged conduct did not even remotely affect, either directly or indirectly, the federal funds appropriated by the federal government to house prisoners. Thus, as the dissent in the court below correctly recognized, the bribery transaction did not threaten any federal interest which § 666 serves to protect. *See U.S. v. Marmolejo*, 89 F.3d 1185, 1201 (5th Cir. 1996).

The majority's difficulty in determining whether the bribery scheme influenced a transaction involving "anything of value of $5,000 or more," only serves to underscore the fact that federal funds were not threatened by the scheme. The statute's language is ambiguous with respect to whether the "anything of value of $5,000 or more," which triggers prosecution under § 666, is valuated from the perspective of the receiving party or the organization whose business is affected by the bribery scheme.

The fact that a dollar sum is placed on the second "anything of value" is consistent with Congress's intent to vindicate "significant" acts of theft or bribery from the government's perspective, and to vindicate only those acts which ultimately implicate things capable of monetary valuation. Thus, the language of the statute coupled with the clear legislative intent, strongly suggests that the

bribery scheme must ultimately impact the distribution or disbursement of federal funds.

Conjugal visits simply are not worthy of monetary valuation from the government's perspective. As previously explained, Congress's purpose in enacting § 666 is to protect the integrity of federal funds, not to ensure honest services generally. That the court below had difficulty placing a monetary value on the conjugal visits only underscores the fact that no significant federal monetary interests were implicated. Thus, although the alleged bribery scheme clearly involved dishonesty, § 666 is simply not the proper vehicle for vindicating the conduct in this case.

CONCLUSION

It thus cannot be presumed that Congress intended in § 666 to vastly expand federal criminal jurisdiction – to reach virtually all bribery involving state and local officials – without any mention in its text, statutory findings, or legislative history. Instead, under *Bass* and its progeny, before courts may construe a federal criminal statute to so fundamentally alter the relationship between federal and state governments, Congress must have clearly stated its intent to do so. Congress has made no such statement here.

The appropriate course, therefore, is to read the phrase "anything of value of $5,000 or more" in § 666(a)(1)(B) to parallel "$10,000 under a Federal program" in § 666(b). This construction criminalizes bribery of public officials when the transaction at issue involves a

minimum of $5,000 in federal funds. Such a reading is fully consistent with the federal interests identified in the legislative history: protecting the integrity of federal funds, whether those funds are being administered by federal officials, or by officials of state or local government or private organizations.

Respectfully submitted,

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